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Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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In re: : Chapter 11
:
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)
et al., :
:
Debtors. : Jointly Administered
- - - - - x

**DEBTORS' RESPONSE AND OBJECTION TO MOTION FOR RELIEF
FROM AUTOMATIC STAY OF 11 U.S.C. § 362(A) WITH
SUPPORTING MEMORANDUM OF LAW AND REQUEST FOR
SHORTENED NOTICE AND EXPEDITED HEARING**

The debtors and debtors in possession in the
above-captioned jointly administered cases (collectively,

the "Debtors")¹ hereby respond and object (the "Response")² to the Motion for Relief from Automatic Stay of 11 U.S.C. § 362(a) with Supporting Memorandum of Law (the "Motion for Relief from Stay") and Request for Shortened Notice and Expedited Hearing (the "Expedited Motion") (the Motion for Relief from Stay and the Expedited Motion are collectively, the "Motions") filed by Reverend Dwayne Funches, also known as Bishop Funches, individually, and as Independent Executor of the Estates of Travis Funches, Dione Funches, and Dwayne Funches, Jr., Emily Funches, Lovera S. Funches, and Shatira Funches, individually (collectively, the "Movants") for entry of an order(s) (i) granting the Movants' Expedited Motion and (ii) granting the Movants Motion for Relief

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), Prahs, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courcheval, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 9950 Mayland3 Drive, Richmond, Virginia 23233.

² Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to them in the Motions.

from Stay. In support of the Response, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Movants have not, and cannot meet their burdens with respect to the Motion to Expedite or the Motion for Relief from Stay. The Movants have alleged no facts as to why the relief they seek is emergent and necessary at this time. With respect to the Motion for Relief from Stay, the Movants have failed to meet their statutory burdens under section 362 of the Bankruptcy Code to establish cause to lift or modify the automatic stay. In the Motion for Relief, the Movants seek lifting of the automatic stay to allow the Movants to continue the Lawsuit pending against the Debtors and three (3) other codefendants to pursue the "limits of any insurance policy or policies insuring the Debtors for the matters raised in the Lawsuit." Motions, ¶ 4. The Movants argue that the stay should be lifted because the Lawsuit has been active for nearly four (4) years, it will promote judicial economy, it will not disrupt the Debtors' reorganization, the Debtors' estates will be protected, and the Movants' claims would be satisfied

by insurance proceeds. Motions, ¶ 8. Notwithstanding that many of these statements are false, none of these factors, individually or collectively, demonstrate cause to lift or modify the automatic stay. Moreover, the Movants have failed to demonstrate that they will suffer any harm or prejudice as a result of the automatic stay, if the Lawsuit does not proceed.

2. Conversely, the Debtors will suffer substantial injury if the stay is lifted and the Movants are allowed to proceed to trial with the Lawsuit.³ Also, as set forth below, the Movants fundamentally misunderstand the nature of the Debtors' insurance coverage because the Debtors will incur substantially costs to defend the Lawsuit notwithstanding that the Movants are only entitled, if anything, to an unsecured claim, which may or may not be covered by pure "first dollar" insurance.

3. At the beginning stages of these chapter 11 cases, the most crucial time of their reorganization,

³ It should be noted that notwithstanding the long pendency of the Lawsuit, no trial date has been set and significant discovery is still ongoing.

the Debtors must concentrate all of their considerable efforts on the immense tasks at hand and not the burdensome and costly litigation still pending in the Lawsuit. Defending against the Lawsuit is precisely the type of costly and consuming distraction that the Debtors cannot afford at this time in these chapter 11 cases.

4. The Movants can continue with the Lawsuit against the non-debtor co-defendants provided it does not impact the Debtors.

5. Moreover, the delay, if any, imposed upon the Movants as a result of the automatic stay is likely to be minimal. Because the Movants have articulated no cause for an expedited hearing nor lifting the automatic stay, both Motions should be denied in their entirety.

OBJECTION TO THE EXPEDITED MOTION

6. The Debtors respectfully object to the Movants' Expedited Motion. The Movants allege that the basis and need for an expedited hearing is due to a "significant State Court hearing" that is scheduled for December 4, 2008. To the best of the Debtors' knowledge, the December 4, 2008 hearing does not involve any of the

Debtors, but rather only non-debtor codefendants. The automatic stay only stays actions against the Debtors - not non-debtor parties. Accordingly, the automatic stay does not preclude the Movants from proceeding with any hearings, depositions, or other proceedings provided it does not impact the Debtors' rights, defenses, and positions.

7. In addition, the Movants have failed to allege any facts or circumstances as to why there is a legitimate need for an expedited hearing on this matter. As set forth in the Expedited Motion, the underlying lawsuit was filed in 2005 and no trial date has yet been set. The Movants have alleged nothing other than a statement that "one hearing" and certain depositions have been cancelled due to the Debtors' bankruptcy filing to justify "cause" for this Court to grant the Expedited Motion and the Motion for Relief from Stay. Expedited Motion, ¶ 6. Nearly four (4) years have passed since filing the lawsuit, the Movants will not be prejudiced by a slight delay or deferment in the state

court proceedings. Furthermore, the Movants have failed to establish any facts to justify an emergency hearing.⁴

OBJECTION TO THE MOTION FOR RELIEF FROM STAY

8. The Debtors respectfully object to the Movants' Motion for Relief from Stay. The Movants request that they be permitted "the limited and immediate relief to continue without further interruption or delay to prosecute the Lawsuit to judgment in the State Court, to collect on such judgment from any available insurance coverage(s), and/or to settle the Lawsuit and collect any settlement(s) from any available insurance coverage(s)." Motions, ¶ 6. The Movants misunderstand the Debtors' insurance coverage and the necessary costs, time, and involvement associated with the Debtors' continued involvement and participation in the Lawsuit. The Debtors have \$500,000 in self-insured retention and then a \$1,500,000 deductible before any insurance monies are impacted. In addition, the Debtors fund litigation expenses that are

⁴ In addition, the Expedited Motion does not comply with the Local Rule 9013-1(N) by failing to file or attach a verified certification.

charged against these retentions and deductibles. The Debtors have spent in excess of \$300,000 to date defending this Lawsuit notwithstanding very little progress in the proceedings. Accordingly, the Movants would have to receive a judgment in the minimum amount of \$2,000,000 (less incurred expenses) against the Debtors before they would receive any insurance proceeds. Continuation of the case against the Debtors would, at a minimum, cause the Debtors to have to expend significant additional costs in the defense of the Lawsuit.

9. The Movants are entitled to file a proof of claim for the full amount they assert against the Debtors, which pursuant to Rule 3001(f) of the Bankruptcy Rules is considered prima facie evidence of the validity of the claim and amount until objected to by the Debtors or another proper party in interest.

10. The automatic stay provided for in section 362 of the Bankruptcy Code operates as a stay against:

[T]he commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that

was or could have been commenced
before the commencement of the case
under this title. . . .

11 U.S.C. § 362. "The automatic stay is the most
fundamental protection afforded a debtor in bankruptcy,"
In re Nelco, B.R. 790, 810 (Bankr. E.D. Va. 1999), and
Congress intended the automatic stay protection to have
broad application. See H.R. Rep. No. 95-595. 95th Cong.,
a340-42(1978), reprinted in 1978 U.S.C.C.A.N. 5963,
6296-97; S. Rep. No. 95-989, at 49-51 (1978), reprinted
in 1978 U.S.C.C.A.N. 5787, 5840-41. "The main purpose
of the automatic stay is to give the debtor a breathing
spell from his creditors, to stop all collection efforts,
harassment and foreclosure actions." In re Atlas
Machine & Iron Works, 239 B.R. 322, 328 (Bankr. E.D. Va.
1998)(citation omitted); see also In re A.H. Robins Co.,
788 F.2d 994, 998 (4th Cir. 1985) (stating that a key
purpose of section 362 is "to provide the debtor and its
executives with a reasonable respite from the protracted
litigation, during which they may have an opportunity to
formulate a plan of reorganization for the debtor"); In
re Avis, 178 F.3d 718, 720-721 (4th Cir. 1999).

11. Pursuant to section 326(d)(1), an unsecured creditor is entitled to relief from the automatic stay only if it is able to show that cause exists for such relief. See In re Tristar Auto Group, Inc., 141 B.R. 41, 44 (Bankr. S.D.N.Y. 1992)(an unsecured creditor must "establish extraordinary circumstances" for the court to lift the stay). The only express statutory definition of "cause" includes "the lack of adequate protection of an interest in property of such parting in interest." 11 U.S.C. § 326(d)(1). Other circumstances constituting "cause" are determined by the courts on a "case-by-case" basis. See In re Robbins, 964 F.2d 342, 345 (4th Cir. 1992). The moving party carries the burden of making an "initial showing of 'cause' for relief from the stay." In re Mazzeo, 167 F.3d 139,142 (2d Cir. 1999)(citations omitted).

12. To determine whether "cause" exists to lift or modify the automatic stay, the Fourth Circuit has established that a bankruptcy court "must balance potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the

person seeking relief from the automatic stay if relief is denied." Robbins, 964 F.2d at 345 (citing In re Peterson, 116B.R. 247, 249 (D.Colo. 1990)); see also In re Robinson, 169 B.R. 356 (E.D. Va. 1994) (the court must attempt to "harmonize the interest of both debtor and creditors while preserving the debtors assets for repayment and reorganization...").⁵

13. As demonstrated below, applying this balancing test, the Movants cannot establish a prima facie showing that sufficient cause exists to allow relief from the automatic stay as they have not alleged that the brief time delay imposed by the stay against the Debtors will impose a serious burden upon them. However, even if the Court finds that the Movants have leapt the prima facie hurdle, the facts underlying the Motion demonstrate that the Debtors are entitled to continued protection from the automatic stay.

⁵ In making this determination, some of the factors the court should consider are: "1) whether the issues in the litigation involve only state law; 2) whether modifying the stay will promote judicial economy; 3) whether the bankruptcy court will be disrupted if the stay is not lifted; and 4) whether the estate can be protected if the estate is lifted." Robinson, 169 B.R. at 359 (citing Robbins, 964 F.2d at 344).

A. Permitting the Lawsuit to Proceed Would Cause Prejudice to the Debtors and the Estates

14. The "key to determining whether to permit an action to proceed in another tribunal" is whether that case will cause "interference with the pending bankruptcy case." In re Penn-Dixie Indus., 6 B.R. 832, 835 (Bankr. S.D.N.Y. 1980). Even participation in preliminary proceedings can be disruptive, as the Penn-Dixie court explained:

Interference by creditors in the administration of the estate, no matter how small, through the continuance of a preliminary skirmish in a suit outside the Bankruptcy Court is prohibited. In short, the Debtor should not be required to devote energy to this collateral matter at this juncture. . . . This Court will not allow Plaintiffs to chip away piecemeal at the Debtor's automatic stay protection.

Id. at 836-37 (refusing to lift stay for the limited purpose of requiring the debtor to produce customer list in class certification proceeding); see In re Towner Petro. Co., 48 B.R. 183, 191 (Bankr. W.D. Okla, 1985) (refusing to lift stay because discovery would require the debtor to expend sufficient time and effort away

from the debtor's attempts at reorganization so as to prejudice the reorganization efforts); In re Curtis, 40 B.R. 795, 806 (Bankr. D. Utah 1984) ("Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit."); see also In re Collins, 118 B.R. 35, 38 (Bankr. D. Md. 1990).

15. At the outset, it should be noted that the Movants' Motion for Relief is inconsistent with the fundamental purpose of the automatic stay. The Motion for Relief was filed during the initial stages of these chapter 11 cases, and seeks to force the Debtors to proceed immediately with the Lawsuit, which is burdensome, time-consuming, costly litigation. The Debtors' management and in-house legal team are already taxed with the responsibility of managing and responding to inquiries from the Debtors' creditors, vendors, employees, and other parties-in-interest regarding these chapter 11 cases. The Movants nevertheless argue that the stay should be lifted so that they can proceed with the Lawsuit.

16. The Debtors and their estates would be prejudiced if the automatic stay were modified to permit the Lawsuit to proceed at this point in these chapter 11 cases because litigating the Lawsuit would expose them to significant financial commitments and litigation costs in addition to the potential liability in the Lawsuit.

17. Accordingly, the Debtors will suffer significant prejudice if the Motion for Relief were granted because of the distraction and interference to the Debtors' reorganization efforts that would flow from allowing the Lawsuit to proceed at this early stage of these chapter 11 cases. See In re United States Brass Corp., 173 B.R. 1000, 1006 (Bankr. E.D. Tex 1994) ("When balancing the hardships in lifting the stay, the most important factor is the effect of such litigation on the administration of the estate; even slight interference with the administration may be enough to preclude relief.")(citing In re Curtis, 40 B.R. 795, 806 (Bankr. D. Utah 1984)).

**B. The Movants Would Suffer Little, If Any,
Hardship If The Automatic Stay Is Retained**

18. While the Debtors would suffer significant prejudice in moving forward with the Lawsuit at this time, the Movants have not shown that they would be prejudiced if the Motion is denied. Such a denial would only continue the status quo, and the Movants would only face the ordinary delay that all creditors face in complex chapter 11 cases. Creditor delay is inherent in the bankruptcy process, and is an unavoidable - and intended - consequence of the automatic stay. See In re Comdisco, Inc., 271 B.R. 273, 279 (Bankr. N.D.III. 2002) ("The automatic stay almost always delays litigants. That, after all, is its purpose, and the reason they call it a 'stay.'"). Furthermore, the Lawsuit is still in the pretrial stages. The Lawsuit has been pending for nearly four (4) years and substantial discovery and pretrial motions remain outstanding, and, if the Lawsuit were permitted to proceed toward trial in the State Court in Illinois, a decision on the merits leading to a liquidated claim could take several years. It is not likely, then, that

the stay would have any effect on the timing of the disposition of the Lawsuit. Accordingly, it is in the best interests of both parties for the automatic stay to remain.

CONCLUSION

WHEREFORE, for the foregoing reasons the Debtors respectfully request that the Court deny the Expedited Motion and Motion for Relief and grant the Debtors such other and further relief as this Court deems just and proper.

Dated: December 2, 2008
Richmond, Virginia

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